IN THE

Supreme Court of the United States

October Term, 197..

No. **77-958**

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

vs.

THOMAS CARL JONES, A/K/A,
THOMAS CARL FRIDAY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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THOMAS CARL FRIDAY,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO

THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, the Commonwealth of Pennsylvania, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered on October 7, 1977, in the above-captioned case.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania is reported at_____Pa._____, 378 A.2d 835 (1977), and is set forth in the Appendix. Also set forth in the Appendix is the Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania which is reported at 101 Montg. Co. L. R. 80 (1976).

JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on October 7, 1977. This Petition for Certiorari was filed within 90 days of that Order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

When does a limited inquiry involved in a police-citizen encounter which is voluntarily entered into and continued by the citizen become a "stop" so as to bring into operation the Fourteenth and Fourth Amendments of the United States Constitution?

Where a law enforcement officer, upon encountering a citizen on a highway, requests identification and invites the citizen to sit in the officer's patrol car which invitation is willingly accepted pending completion of a computer check with the National Crime Information Center, (hereinafter: N.C.I.C.), which check comes back positive for theft of a weapon; does such an initial limited inquiry constitute a "stop", so as to bring into operation the Fourteenth and Fourth Amendments of the United States Constitution?

Is the limited inquiry described an unreasonable seizure within the purview of the Fourteenth and Fourth Amendments to the United States Constitution requiring application of the exclusionary rule?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen, Section One.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment Four.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On April 3, 1975, the dead body of Eleanor Friday was discovered at her home at 1002 Sterigere Street, Norristown, Montgomery County, Pennsylvania. The discovery was first reported to police by her nephew, Thomas Carl Jones, the respondent. Mrs. Friday had been beaten to death with a blunt instrument. Later the same day, the respondent was interviewed by police, not as a suspect at this time, but merely as the person who had discovered the body. When the police sought Jones on April 4, 1975, for further questioning, it was discovered that he had fled the area, possibly carrying a .38 caliber Webley revolver allegedly removed from his place of employment. Information on the warrant for his arrest for Theft of Movable Property (18 Pa. C.S.A., Section 3921)[1] was transmitted to the N.C.I.C.

On April 6, 1975, Corporal Herbert J. Hoffman, of the Missouri State Highway Patrol, noticed a transient "hitchhiker" on the entrance ramp to Interstate 44 near Rolla, Missouri. (N.T. 126, 127.)[2] The individual was carrying no luggage and was unshaven and unkempt. (N.T. 179.) Corporal Hoffman made a mental note of the individual and then proceeded to headquarters, as he was on his way to work. (N.T. 175.) Approximately one (1) hour later, Corporal Hoffman, riding in a patrol vehicle in full uniform, again sighted the same individual on Interstate 63, which runs through the center of Rolla, Missouri. (N.T. 176.) The individual seemed to be hitchhiking, but Corporal Hoffman did not actually observe him to do so. (N.T. 128, 175.) He did observe this individual standing on the highway. (N.T. 134.) The Corporal testified that it was obvious to him that the individual was not a member of the local community, but a transient. (N.T. 179.) His curiosity aroused, Corporal Hoffman approached the individual, requested identification, and invited the individual to sit in the patrol car. The subject identified himself as Thomas Carl Jones.

[1] §3921. Theft by unlawful taking or disposition

(a) Movable Property.—A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.

(b) Immovable property.—A person is guilty of theft if he unlawfully transfers, or exercises unlawful control over, immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

Corporal Hoffman testified that had this individual so requested, he would have been permitted to leave. (N.T. 181.) Upon learning the subject's name, Corporal Hoffman contacted N.C.I.C. for a check and received an affirmative response for a warrant issued in Montgomery County, Pennsylvania for Theft of the .38 caliber Webley revolver. At this point, Corporal Hoffman asked the defendant to stand outside of the vehicle, at which time he advised Jones he was going to search him for a weapon. Jones indicated that he was carrying a revolver. Corporal Hoffman patted Jones down and secured from his person a .38 caliber Webley revolver as described in the warrant for his arrest. (N.T. 128.) The Corporal then placed Thomas Jones under arrest for Carrying a Concealed Deadly Weapon, a criminal offense in Missouri. (N.T. 129.) He advised Jones of his constitutional rights pursuant to Miranda[3] and transported Jones to headquarters. (N.T. 130.) Subsequently, Jones made a statement to Corporal Hoffman which was exculpatory in nature. (N.T. 131, 132.) Jones was thereafter returned to Pennsylvania and charged with the Murder of Eleanor Friday.

On November 6, 1975, the Honorable Robert W. Tredinnick, of the Court of Common Pleas of Montgomery County, Pennsylvania, after hearing evidence concerning search and seizure of the .38 caliber Webley revolver, and the defendant's statements to Corporal Hoffman, concluded that the initial stop was without probable cause, and therefore, all evidence obtained as a result of the stop was constitutionally inadmissible. The Commonwealth appealed from the Order of the Trial Court to the Supreme Court of Pennsylvania[4] where the Commonwealth urged that the initial confrontation of Jones by Hoffman was not a seizure within the purview of the Fourth Amendment and that the confrontation, if within the purview of the Fourth Amendment, was justified under the circumstances as a limited investigatory stop. The Supreme Court of Pennsylvania held with regard to the first issue "the initial confrontation of Jones by Hoffman constituted a seizure within the purview of the Fourth Amendment, specifically a 'stop for investigatory purposes' "; as to the second issue the Supreme Court of Pennsylvania held that "the seizure lacks justification because the defendant was violating no law when observed by Corporal Hoffman." This Petition for Certiorari was filed requesting

[2]N.T. refers to Notes of Testimony of the Suppression Hearing of November 5 and 6, 1975.

[3]Miranda v. Arizona, 384 U.S. 438, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4]Direct appeal to the Supreme Court of Pennsylvania involving capital cases is provided for by the Appellate Jurisdiction Act, Act of 1970, July 31, P.L. 673, No. 223 Art. II, Sec. 201, 17 P.S. 211.201.

a review of the decision of the Pennsylvania Supreme Court which is based solely and entirely on the interpretation by that Court of the Fourth and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT'S INTERPRETATION OF THE FOURTEENTH AND FOURTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS INCORRECT IN DETERMINING THAT A "STOP" HAS OCCURRED IN A POLICE-CITIZEN ENCOUNTER WHEN: (1) THE NATURE OF THE ENCOUNTER IS A LIMITED INQUIRY BY THE OFFICER; (2) THE CITIZEN VOLUNTARILY ENTERS INTO AND CONTINUES THE ENCOUNTER; AND (3) THE OFFICER HAS NOT RESTRAINED THE CITIZEN FROM FREELY TERMINATING THE ENCOUNTER.

THE PENNSYLVANIA SUPREME COURT FURTHER MISINTERPRETED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN DETERMINING THAT AN UNREASONABLE SEIZURE RESULTED FROM THE INVITATION OF THE OFFICER TO THE CITIZEN TO SIT IN THE PATROL CAR AND THE CITIZEN'S ACCEPTANCE THEREOF, THEREFORE, REQUIRING THE APPLICATION OF THE EXCLUSIONARY RULE.[5]

The public interest in permitting limited police inquiries requires that a police officer be permitted to address questions to individuals whom the officer encounters in the course of his daily routine.

Mr. Justice White recognized this interest in his concurring Opinion in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), when he stated:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances the person approached may not be detained or frisked but may refuse to cooperate and go his way. 392 U.S. at 34.

[5]Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Corporal Hoffman's initial encounter with Jones was for a limited purpose: to secure identification and determine if the N.C.I.C. had any information pertaining to him. At the time of the initial encounter, Hoffman did not frisk Jones; he merely invited him to sit in the car. They engaged in casual conversation[6] until the N.C.I.C. report indicated that there was a warrant for Jones' arrest. At this point, there was probable cause for arrest; Corporal Hoffman immediately frisked Jones[7] and seized the weapon found. This was indeed the weapon for which the warrant had been issued and the weapon the Commonwealth sought to admit as the murder weapon in the case at bar.

The distinction between a limited police-citizen street inquiry and a "stop" represents the balance which must be struck between legitimate and proper police investigation and an individual's right to be free from unreasonable police detention.[8] It is this distinction which petitioner urges this Honorable Court to define in this case.

When in the course of limited police inquiry, an encounter with an individual occurs, there is no violation of the Fourteenth and Fourth Amendments if the individual willingly enters into and continues that encounter. In U.S. v. Brunson, 549 F.2d 348 (9th Cir. 1977), the Court stated at 357:

> . . . a person is not arrested or seized under the Fourth Amendment if he is free to choose whether to enter or continue an encounter with police and elects to do so.

The cases of Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); Morales v. New York, 396 U.S. 102, 90 S.Ct. 291, 24 L.Ed.2d 299 (1969); and Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), clearly indicate that an encounter consenually entered into without duress or coercion does not give rise to a Fourth Amendment claim of an unlawful seizure.[9]

[6]N.T. 180

[7]N.T. 128

[8]"The line of distinction between 'approaching a person and addressing questions to him' or 'legally stopping' him . . . and restraining him or making a 'forcible stop' . . . is not subject to precise definition because of 'the myriad daily situations in which policemen and citizens confront each other on the street' ". Commonwealth v. Jones, ____ Pa.____, 378 A.2d 835, 839, infra., appendix #1 p. 4-A.

[9]Also U.S. v. Johnson, 452 F.2d 1363 (D.C.C. 1971), U.S. v. Bailey, 447 F.2d 735 (8th Cir. 1971), U.S. v. Holland, 438 F.2d 887 (6th Cir. 1971), U.S. v. Kershner, 432 F.2d 1066 (5th Cir. 1970), Doran v. U.S., 421 F.2d 865 (9th Cir. 1970), Government of Virgin Islands v. Kirnon, 377 F. Supp. 601 (D.V.I. 1974).

Indeed, a similar distinction is made in interpreting Fifth Amendment rights during "custodial" and "non-custodial" interrogation vis a' vis the requirement that Miranda warnings be given. In the case of Barfield v. State of Alabama, 552 F.2d 114 (5th Cir. 1977), the Court held that the defendant there voluntarily came to the police station and was free to leave. A remark by the interrogating officer to the extent that the defendant could not leave was viewed there as a precatory request rather than a command under the totality of the circumstances.[10]

In the case at bar, the Pennsylvania Supreme Court stated:

> While the situation presents a close question, an examination of the entire situation shows not only an exercise of force but also an escalation in that exercise. Hoffman approached Jones on a highway in a marked car and in uniform and addressed questions to him. In doing so, he did not merely ask Jones his name; rather, he immediately sought identification from Jones, and, when Jones complied he escalated the exercise of force by asking Jones to be seated in the car. This latter request was not merely an attempt to obtain information; rather, while stated as a question, it sought control of Jones' movement.[11]

The Pennsylvania Supreme Court, therefore, has established a per se rule whereby a uniformed officer of the law, by virtue of his presence, is deemed to exercise such force as will overbear the will of a reasonable man. This ruling ignores the clear record of the case which unequivocally establishes that the encounter was voluntarily entered into by Jones, that the invitation by Hoffman to Jones to sit in the car was in the form of a question and not a command, that Hoffman's invitation to Jones was willingly accepted by Jones, that Jones was not frisked or handcuffed upon entering the car, that Jones and Hoffman engaged in casual conversation while seated in the vehicle,[12] and that

[10]Also, Oregon v. Mathiason, ____U.S.____, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

[11]" . . . a police officer in uniform must be considered as showing authority and thus exercising some force simply because he is in uniform, a symbol of authority, when he approaches a citizen and addresses questions to him." Commonwealth v. Jones, ____ Pa. ____, 378 A.2d 835, 839, infra., Appendix #1 p. 5-A.

[12]As probative of the non-coercive atmosphere of the encounter.

Jones was free to terminate the encounter.[13]

In Terry v. Ohio, supra. Mr. Chief Justice Warren stated: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[14] In the case at bar, Jones was free to walk away at any time, hence, no seizure occurred. To hold a seizure occurs when an officer questions an individual by virtue of his presence removes all semblance of civility from police-citizen relationships and ignores the principle implicit in the holding of Terry and its progeny that an officer's mere encounter with a citizen on the street does not in and of itself constitute a seizure of the person. The absurdity of this requirement and the needless hampering of police-citizen relationships are readily apparent.

Even assuming that the Supreme Court of Pennsylvania correctly ruled that a seizure occurred at such an early stage in the encounter, the intrusion at that time was de minimus and reasonable under the circumstances and should not be the subject of the exclusionary rule. In Terry v. Ohio, supra, Chief Justice Warren stated:

> . . . In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion. [15]

Corporal Hoffman first observed Jones hitchhiking on Interstate 44 in Rolla, Missouri, at 7:00 a.m. on April 6, 1975. At 8:30 a.m., that same morning, he again observed Jones–this time on Route 63, about three (3) miles from the first sighting–hitchhiking south.[16] Jones was dressed in a mackinaw coat and was without luggage. He was recognized as a transient non-resident and he appeared unkempt.

It was not unreasonable under these circumstances for Hoffman to approach Jones and request identification. The facts elicited clearly

[13]At N.T. 181: "Q. (By Assistant District Attorney) Was he under arrest at that time (in the car)? A. (By Hoffman) No, sir. Q. If he wanted to leave would you have allowed him to leave? A. Probably would have, yes, sir."

[14]392 U.S. 16.

[15]392 U.S. 21.

[16]In order to reach Route 63 from the location of the first sighting, Jones would have had to backtrack three (3) miles. Route 63 was a minor highway compared to Route 44 and did not proceed beyond the municipal corporate limits of Rolla.

indicate the reasonableness of the manner and conduct of the encounter and do not admit of "lawless police conduct"[17] such as that which would warrant the application of the exclusionary rule.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

RESPECTFULLY SUBMITTED,

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[17]Terry v. Ohio, supra, at 367 U.S. 656.

Appendix A

Supreme Court of Pennsylvania
Eastern District

Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA	:	NO. 133
Appellant	:	JANUARY TERM,
v.	:	1976
THOMAS CARL JONES a/k/a	:	
THOMAS CARL FRIDAY	:	

JUDGMENT

On CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS of MONTGOMERY COUNTY, be, and the same is hereby AFFIRMED.

BY THE COURT:

Sally Mrvos, Esquire
Prothonotary

Dated: October 7, 1977

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA
Appellant

v.

THOMAS CARL JONES a/k/a
Thomas Carl Friday

No. 133, January Term 1976

Appeal from the Order of the Court of Common Pleas of Montgomery County at No. 2655 April Term 1975
ENTERED: November 13, 1975

OPINION OF THE COURT

EAGEN, C.J.

FILED: October 7, 1977

Thomas Carl Jones was charged with murder and numerous related offenses in Montgomery County. He filed motions to suppress evidence of certain statements given by him to police and certain physical evidence seized by the police. Following a hearing on these motions, the Court of Common Pleas by order dated November 6, 1975 suppressed evidence of a .38 caliber gun taken by the police from Jones' possession and evidence of statements made by Jones to the police on April 6, 1975. The Commonwealth filed this appeal from that order. We now affirm.

The relevant facts as established at the suppression hearing are as follows:

On April 3, 1975, at approximately 1:11 p.m., the Norristown police, in response to a phone call, went to 1002 Sterigere Street, Norristown, where the dead body of Eleanor Friday reportedly had been discovered by Jones, her nephew. She had apparently been beaten with a blunt instrument. The police interviewed Jones on April 3rd.

On April 4, 1975, when the police sought Jones at his residence for further questioning, they discovered he had fled the area. The police also learned various facts which resulted in the issuance of a warrant for Jones' arrest for theft of movable property, 18 Pa. C.S.A. §3125, namely, a .38 caliber revolver. Notice that an arrest warrant was outstanding against Jones was transmitted to the National Crime Information Center [NCIC].

On April 6, 1975, shortly after 7:00 a.m., Corporal Herbert Hoffman of the Missouri State Highway Patrol saw Jones apparently[1] hitchhiking west on Interstate Highway 44 in Rolla, Missouri. Hoffman proceeded to the police station without encountering Jones. At about 8:30 a.m. on the same day, Hoffman again observed Jones; but, in this instance, Jones was walking south, about three miles from where he was first observed, on United States Route Number 63 which intersects Interstate 44. During both observations, Jones was without luggage. Hoffman, in uniform, stopped his vehicle, a marked police car, and asked Jones for identification. Jones handed Hoffman an identification card and Hoffman then "asked [Jones] to have a seat in the patrol car." Hoffman radioed to have a check on Jones run through the NCIC. While the check was being made, Hoffman and Jones engaged in "general conversation." Hoffman testified that Jones was free to leave before the results of the NCIC check was obtained. From the check, Hoffman learned of the outstanding arrest warrant.

Hoffman then asked Jones to step out of the car and Jones complied. As Jones did so, he held his hand up and informed Hoffman he had a weapon. Hoffman then searched Jones and obtained a .38 caliber gun. Hoffman advised Jones he was under arrest for carrying a concealed weapon and also advised him of his constitutional rights. Hoffman then transported Jones to a police station.

At 1:30 p.m. the same day, Hoffman, after having a conversation with a detective in Pennsylvania, spoke with Jones. During this conversation, Jones made various statements[2] relating his activities on April 2nd and 3rd.

Hoffman testified that he approached Jones because his curiosity was aroused by Jones' general appearance, unshaven and unkempt, by his change of direction, by his not having luggage, and because he was not a local resident and had changed his route of travel from an Interstate Highway to a route which was not a "main artery." Additionally, Hoffman testified Jones was not violating any law when observed.[3] Finally, Hoffman testified it was common practice to stop pedestrians on highways in Missouri to learn their identity and destination and to run computer checks on them.

[1]We say apparently because Hoffman testified during direct examination that Jones "seemed to be hitchhiking," and during cross-examination that he was "walking" up "a ramp" to the west bound lane of the Interstate Highway.

[2]The statements were exculpatory.

[3]The Commonwealth has not brought to our attention any law prohibiting the activity in which Jones was engaged when confronted by Hoffman.

The Court of Common Pleas ordered the gun and evidence of the statements made to Hoffman suppressed reasoning that the initial detention of Jones was illegal and that the gun and the statements of April 6th were the products of that illegal detention.

The Commonwealth urges the suppression court erred and contends: 1) the initial confrontation of Jones by Hoffman was not a seizure within the purview of the Fourth Amendment; and/or 2) the confrontation, if within the purview of the Fourth Amendment, was justified under the circumstances as a limited investigatory stop.

As to its first contention, the Commonwealth argues that Hoffman merely approached Jones and questioned him, and that

> "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."

Terry v. Ohio, 392 U.S. 1, 34, 88 S. Ct. 1868 1886 (1968) (White, J. Concurring) [Hereinafter: Terry].

The Supreme Court of the United States has said:

> "not all personal intercourse between policemen and citizens involves 'seizures' of persons."

Terry, supra at 19, n. 16, 88 S. Ct. at 1879, n. 16. Similarly, we have said that:

> "A policeman may legally stop a person and question him. But he may not without a warrant restrain that person from walking away . . ., unless he has 'probable cause' to arrest that person or he observes such unusual and suspicious conduct on the part of the person who is stopped . . . that the policeman may reasonably conclude that criminal activity may be afoot . . . " [Footnote omitted.]

Commonwealth v. Berrios, 437 Pa. 338, 340, 263 A. 2d 342, (1970).

The line of distinction between merely "approaching a person and addressing questions to him" or "legally stopping" him, Commonwealth v. Berrios, supra at 340, 263 A. 2d at , [Hereinafter: contact], and restraining him or making a "forcible stop," Terry, supra at 32, 88 S. Ct. at 1885 (Harlan J. Concurring) [Hereinafter: stop], is not subject to precise definition[4] because of "the myriad daily

[4]The various types of confrontations which can occur between persons and police officers have been categorized as "contacts," "stops" or "temporary detentions of persons for investigation," and "arrests" by the Project on Law Enforcement Policy and Rulemaking in the Model Rules for Law Enforcement: Stop and Frisk, College of Law, Arizona State University and Police

situations in which policemen and citizens confront each other on the street." Terry, supra at 12, 88 S. Ct. at 1875. Each factual situation must be examined to determine if force was used to restrain the citizen in some way. Such force may include "physical force or [a] show of authority." Terry, supra at 19, n. 16, 88 S. Ct. at 1868, n. 16.

If a citizen approached by a police officer is ordered to stop or is physically restrained, obviously a "stop" occurs. Equally obvious is a situation where a police officer approaches a citizen and addresses questions to him, the citizen attempts to leave, and the officer orders him to remain or physically restrains him; here too a "stop" occurs. A more difficult situation arises where no order or physical restraint is involved and the citizen does not attempt to walk away. This situation is more difficult because a police officer in uniform must be considered as showing authority and thus exercising some force simply because he is in uniform, a symbol of authority, when he approaches a citizen and addresses questions to him.

But this is not to say that the force inherent in a uniform is sufficient in itself to warrant a conclusion that a restraint on liberty of a "stop" occurs when the citizen is approached and questioned. Indeed, Terry, supra, clearly indicates a uniform, as a symbol of authority, is not in itself a sufficient exercise of force to conclude a "stop" occurs when a citizen is approached and questioned.[5]

Since an officer in uniform approaching a citizen and questioning him involves an exercise of force, i.e., a show of some authority, and since that force is insufficient to conclude a "stop" occurs,[6] it follows

Foundation (1974). All "contacts" are not "seizures" within the purview of the fourth amendment. However, a "stop" or "temporary detention for investigation" to be legal must meet the standard enunciated in Terry, supra, namely, that the officer must observe "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . " Terry, supra at 30, 88 S. Ct. at 1884. See also Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921 (1972), wherein the Supreme Court of the United States ruled a "stop" may also be justified by an informant's tip where the tip carries sufficient indicia of reliability.

[5]In Terry, supra, the officer, in plain clothes, approached Terry, identified himself as an officer, and asked Terry for his name prior to searching him. An officer's identification of himself as a police officer conveys the same message to a citizen verbally that a uniform conveys visually, i.e., they are functional equivalents. Yet, the Supreme Court did not consider this message or exercise of force through a "show of force" sufficient for it to conclude a "seizure" took place prior to the officer searching Terry. Terry, supra at 19, n. 16, 88 S. Ct. at 1879, n. 16.

[6]See A.L.I., A Model Code of Pre-arraignment Procedure, Proposed Official Draft, §110.1 (1975), wherein a request by a police officer for cooperation or information from a citizen, as opposed to a suspect, which results in compliance is not regarded as involuntary or coerced compliance absent additional circumstances. Compare Schneckloth v. Bustamonte, 412 U.S. 218, 247, 93 S. Ct. 2041, 2058 (1973), wherein the Supreme Court, albeit in the context of a consent search, stated: "[t]here is no reason to believe . . . that the response to a policeman's question is presumptively coerced."

that whether a "stop" occurs is not dependent on the presence or absence of any force; rather, it is dependent on the amount of force exercised.

Thus, to determine when a "stop" has occurred in the more difficult situation all of the circumstances which may in any way evidence a show of authority or exercise of force including such subtle factors as the demeanor of the police officer, the location of the confrontation, the manner of expression used by the officer in addressing the citizen, and the content of the interrogatories or statements must be examined. Once this factual examination has been made, the pivotal inquiry is whether, considering all of the facts and circumstances evidencing an exercise of force, "a reasonable man, innocent of any crime, would have thought [he was being restrained] had he been in the defendant's shoes." United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965), aff'd by order No. 20,059 (D.C. Cir. 1966).[7]

Instantly, we believe the totality of the circumstances would have led a reasonable man to conclude he was being restrained or stopped for investigatory purposes by Hoffman's initial exercise of force when confronting Jones. While the situation presents a close question, an examination of the entire situation shows not only an exercise of force but also an escalation in that exercise. Hoffman approached Jones on a

[7]We adopt this wholly objective standard for determining what amount of force will result in a conclusion that a "stop" occurs for numerous reasons:

1) a wholly subjective test would require police investigating crime to modify their behavior towards each and every person they approach and thereby result in the police being unable to predict what type of behavior on their part will result in a seizure, cf. Hicks v. United States, 382 F. 2d 158 (D.C. Cir. 1967); and,

2) a subjective-objective test, which would require the accused to subjectively conclude he was being restrained and to conclude so reasonably, would not serve the deterrent purpose of the exclusionary rule because a policeman might escalate his exercise of force when confronting persons he believes are not easily restrained by authority.

The wholly objective test has apparently been adopted by the United States Court of Appeals for the District of Columbia since it has been quoted with approval. See Hicks v. United States, supra; Coutes v. United States, 413 F. 2d 371 (D.C. Cir. 1969); Frazier v. United States, 419 F. 2d 1161 (D.C. Cir. 1969); Fuller v. United States, 407 F. 2d 1199 (D.C. Cir. 1968), cert. denied, 89 S. Ct. 999. In Fuller, supra, the court declined to express a view on whether the test would be modified if it were shown the officer was or should have been aware of a condition of the citizen which would lessen his capacity to act as a reasonable man. Likewise, we need not now express any view on such a possible modification of the test.

We also note that, while not required to do so, an officer who wishes to approach a citizen to investigate crime but who does not wish to "stop" that citizen, can best predict the consequences of his behavior by advising the citizen he is free to leave without answering questions. Cf. LaFave, 'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich. L. R. 39 (1968); Bogomolny, Street Patrol: The Decision to Stop a Citizen, 12 Crim. L. B. 544 (1976).

highway in a marked car and in uniform and addressed questions to him. In doing so, he did not merely ask Jones his name; rather, he immediately sought identification from Jones, and, when Jones complied he escalated the exercise of force by asking Jones to be seated in the car. This latter request was not merely an attempt to obtain information; rather, while stated as a question, it sought control of Jones' movement.[8] Thus, we believe the Court of Common Pleas was correct in ruling the initial confrontation of Jones by Hoffman constituted a seizure within the purview of the fourth amendment, specifically a "stop for investigatory purposes."

As to the Commonwealth's second contention, that the initial seizure was justified as a limited investigatory stop, little discussion is required. A stop for investigatory purposes in this context is justified only if the "police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . " Terry, supra at 33, 88 S. Ct. at 1884. Hoffman testified his observations aroused his curiosity and suspicion about Jones; but, he also testified Jones was violating no law when observed and the record is devoid of any facts to support a reasonable conclusion that criminal activity may have been afoot. Thus, under the circumstances presented, the seizure lacked justification.

The order of the Court of Common Pleas is affirmed.

Former Chief Justice Jones did not participate in the consideration or decision of this case.

[8]We note that Hoffman's questions did not focus on a general investigation of crime; rather, they focused on Jones. Considering the nature of the questions and their focus on Jones, we believe a reasonable man would conclude Hoffman was displaying authority in order to restrain him. Compare Commonwealth v. Fisher, 466 Pa. 216, 352 A. 2d 26 (1976), wherein we reiterated the requirement that Miranda warnings be given in a situation where a person reasonably believes his freedom of movement is restricted by interrogation which focuses on him.

APPENDIX B

Commonwealth v. Jones

Criminal law – Application to suppress evidence – Pa. Rule Criminal Procedure No. 323(i) – Hair samples – Search.

1. A wife may give consent to the search of premises over which she and her husband jointly exercised dominion and control.
2. A stop and frisk will be deemed illegal where there was no reason to believe that criminal activity might be afoot and that defendant was armed and dangerous.
3. Seizure of a second hair sample is permissible where the defendant did not refuse, and where the day before a search warrant for seizure of the first sample had been read to him.

(Appealed to Supreme Court November 12, 1975.)

C.P. Montgomery County, Criminal Division, April T., 1975, No. 2655. Commonwealth v. Thomas Carl Jones, also known as Thomas Carl Friday.

Marc R. Steinberg, assistant district attorney, for Commonwealth.

William B. Eagan, of *Eagan, Bowen & Hynes*, for defendant.

TREDINNICK, J., February 3, 1976:–On August 22, 1975, defendant filed an application to suppress statements given the authorities in violation of his constitutional rights. An application to suppress physical evidence followed on August 29, 1975.

Hearing on the two applications was held on November 5-6, 1975. The court entered an order on November 6, 1975, denying the applications in certain respects, and granting the prayer thereof in other respects. The following is filed of record in compliance with criminal rule 323(i).

Findings of Fact

1. On April 3, 1975, at about 1:11 p.m., Norristown Police Officer John Tobin arrived at premises 1002 Sterigere Street, Norristown, Montgomery County, Pennsylvania, in response to a call

which had theretofore been received by the police.

2. Upon arrival, defendant escorted Officer Tobin and another officer, John Durante, into the home at that address where the officers found the body of one Eleanor Friday. She had apparently died from other than natural causes.

3. Other officers were called to the scene. While an inspection of the premises was being conducted, defendant remained in the living room with Officers Tobin and Durante. He was upset. For this reason, Officer Tobin subsequently took defendant to the hospital. At the hospital, defendant explained to Tobin that the decedent was his aunt, and that he and his wife had gone to 1002 Sterigere Street to visit his aunt that day. On receiving no answer to their knock on the door, defendant looked in a bedroom window, saw the woman, and was unable to get a response. He then broke a window in a door, gained entry, and found the body. His wife then called the police.

4. On instruction of his superiors, Tobin took defendant to Norristown police headquarters from the hospital.

5. Detective Sergeant Bambi and Detective Robert Butkiewicz interrogated defendant at police headquarters for a period of ten to fifteen minutes commencing about 2:30 p.m. Essentially defendant related the same information as had been given Officer Tobin, but in addition related an occurrence of the day before, when he said he'd lost some bullets for his gun. (Defendant was engaged at that time by Miley Detective Agency, and apparently had a gun in that connection.) Following that interview, defendant left.

6. No *Miranda* warnings were given defendant at any time prior to the conversations and interview recited above. None of the officers involved considered defendant a suspect during this period.

7. By the next day, April 4, 1975, defendant was apparently a suspect. At about 4:30 p.m. on that date, Detective Butkiewicz, along with other officers, went to defendant's in-law's house at 549 Cherry Street, Norristown. Defendant and his wife occupied an apartment in that house. Defendant's wife, her mother and father were present. The officers requested permission to search defendant's apartment. Defendant's wife executed a written consent to the search. A certain black gun holster was found on the premises and seized by the police. Defendant was not present.

8. The following day, when Detective Butkiewicz again went to the house to talk to defendant's wife as to defendant's whereabouts, Mrs. Jones (defendant was also known as Thomas Jones) turned over a private detective's uniform to him.

9. Two days later, on April 6, 1975, Missouri State Trooper Herbert Hoffman saw defendant shortly after 7:00 a.m. on Interstate Highway 44 in Rolla, Missouri, apparently hitchhiking in a westerly direction.

10. At about 8:30 a.m., Cpl. Hoffman again saw defendant, this time walking south on U.S. 63 at the south edge of Rolla, perhaps three miles from where he had first seen defendant.

11. Although defendant was committing no crime, Cpl. Hoffman thereupon stopped his patrol car and asked defendant for his identification. Defendant produced identification. Hoffman then asked defendant to have a seat in the patrol car, and he radioed a request that defendant's name be processed through the National Crime Information Center. Shortly thereafter, he was advised that defendant was a wanted individual.

12. Hoffman then asked defendant to step out of the patrol car. As defendant complied, he held his hand up and informed the trooper that he had a weapon. Hoffman retrieved the weapon from defendant. He then placed defendant under arrest for carrying a concealed weapon, and so informed him. He also correctly and fully advised defendant of his *Miranda* rights.

13. At 1:30 p.m. on that date, after talking with Detective Butkiewicz, Hoffman spoke with defendant, and defendant gave him a complete account of his activities on April 2nd and 3rd. (Exculpatory in nature.)

14. Defendant was subsequently returned to this jurisdiction and charged with a number of offenses, including murder of Eleanor Friday.

15. On August 20, 1975, an application for a search warrant was sworn to before District Justice Harry Moles by Chief of County Detectives Charles G. Moody. The application sought a search warrant for seizure of samples of defendant's head. A warrant issued, and was served on defendant at the Montgomery County Prison. A sample was taken. A day later, (apparently because someone thought that not enough hair had been taken on the first occasion) a county detective

went to defendant's cell and asked if another sample could be taken. Defendant agreed and a second sample was in fact taken.

Conclusions of Law

1. Statements given by defendant to Norristown police officers on April 3, 1975, at a time when defendant was not under suspicion as the perpetrator of the crimes under investigation were constitutionally received, and may be received in evidence at the trial of this cause if otherwise admissible.

2. The seizure of evidence pursuant to a search of defendant's apartment, being the result of a valid consent to a search thereof, was proper, and said evidence may be received at trial of this cause if otherwise admissible.

3. The seizure of the initial hair samples was the result of a validly issued search warrant. The seizure of the second hair sample was accomplished with the consent of the defendant. Both samples may be received in evidence at trial if otherwise competent and admissible.

4. The seizure of a gun from the person of the defendant was the direct result of an illegal detention, and was thus obtained by constitutionally impermissible means, and must be suppressed.

5. Statements given by defendant to Cpl. Herbert Hoffman on April 6, 1975, were obtained as a direct result of an illegal detention, and must be suppressed.

Discussion

The statements given Norristown police by defendant on April 3 were given in a routine investigatory phase of the case at a time when defendant was not a suspect. Under those circumstances, it was unnecessary for the officers to advise defendant of his *Miranda* rights, and his statements are admissible.

The search of defendant's apartment on April 4 was consented to by defendant's wife, who occupied the premises with defendant. That consent was voluntary, under all the circumstances. (Mrs. Jones is a person of normal intelligence, a high school graduate, and her parents were present when the consent was given). It is well-established that a wife may give consent to search premises over which she and her husband jointly exercise dominion and control: *Com. v. Biebighauser,*

450 Pa. 336 (1973). As to defendant's uniform—that was voluntarily surrendered to the police, and is thus admissible: *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

As noted, defendant was not engaged in *any* illegal activity at the time Cpl. Hoffman detained him. Nor did the corporal have any constitutionally valid probable cause to believe that a crime had been committed, or, if so, that defendant had been the perpetrator thereof. Indeed, the officer did not have reasonable cause to stop and frisk, as there was no reason to believe that criminal activity might be afoot and that defendant was armed and dangerous. *Cf. Terry v. Ohio*, 392 U.S. 1 (1968). Thus defendant was subjected to a constitutionally impermissible search and seizure when he was accosted, restrained of his freedom and asked to produce identification: *Com. v. Smith*, 225 Pa. Superior Ct. 509 (1973). The search of his person and seizure of the weapon and statements subsequently made must similarly fall, as all were the direct result of the initial illegal detention: *Com. v. Bishop*, 425 Pa. 175 (1967).

Finally, as to hair samples—no contention was made by defendant that the application for the search warrant failed to establish probable cause for the issuance thereof. Rather, defendant argues that the *second* intrusion upon his person to take additional samples must be suppressed. However, we consider the second seizure to have been accomplished with the consent of the defendant under all the circumstances. He was asked by the officer if another sample could be taken and freely consented thereto, remarking only "don't take it from one spot, I don't want you to make me bald." Since only the day before, a search warrant for seizure of a sample had been read to him, we presume he knew he had a right to refuse, although even that is not a requisite to valid consent: *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

For the foregoing reasons, the order of November 6, 1975 should be sustained.